United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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Docket No. 74-1104

SILVER CHRYSLER PLYMOUTH, INC.,
Plaintiff-Appellee,

against

CHRYSLER MOTORS CORPORATION and
CHRYSLER REALTY CORPORATION,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of New York

REPLY BRIEF OF DEFENDANTS-APPELLANTS

Statement

This reply is submitted by the defendants-appellants, Chrysler Motors Corporation ("Motors") and Chrysler Realty Corporation ("Realty") (hereinafter, sometimes together with their parent Chrysler Corporation, collectively referred to as "Chrysler"), in support of their appeal from Judge Weinstein's order dated November 26, 1973 refusing to disqualify and enjoin Hammond & Schreiber from playing any role or representing or assisting plaintiff in this action.

While there are many statements in the brief of plaintiff-appellee, Silver Chrysler Plymouth, Inc. ("plaintiff"),* which are incorrect or irrelevant, Chrysler, in the interests of brevity, will discuss only those points necessary to clar-

* Pages of plaintiff's brief, dated June 27, 1974, will be referred to herein as "PB," while pages of Chrysler's main brief, dated June 4, 1974, will be cited as "DB". Other page references herein, unless otherwise indicated, are to pages of the joint appendix.

ify some of the key issues pertaining to its motion for disqualification.

Plaintiff's brief is notable in large part for its omissions. It has totally ignored the actual import of Judge Weinstein's decision, and seeks, in effect, to tear up and reconstruct that decision by omitting the bulk of its legal underpinning. Plaintiff goes to the incredible extent of accusing Judge Weinstein of "[b]ending over backwards to protect Chrysler's interests" (PB 42). For example, plaintiff has closed its eyes to the District Court's imposing of a variable burden of proof on Chrysler for disqualification of its former counsel, based upon the size of the law firm and the age, remuneration and power of an attorney within the firm (500a); the effect of that variable burden is to relieve former associates of sizable law firms of ethical obligations towards clients of those firms whom they had represented.* Plaintiff's brief has similarly failed to discuss Judge Weinstein's error in basing his findings on law-firm practice upon unreliable popular books that were outside the record, the general notions of which were refuted, at least so far as Kelley Drye practice is concerned, by evidence before the Court (see DB 36-38). Further, plaintiff has virtually omitted reference to a cornerstone of the District Court's opinion—the ruling that amorphous anti-trust considerations are sufficient to overcome the Code of Professional Responsibility, despite this Court's directly contrary holding in *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 575 (2d Cir. 1973) (see DB 23-25).** By its silence, plaintiff acknowledges that the main elements of Judge Weinstein's decision are unsupportable. At the same

* The District Court's error in creating different standards for the disqualification of partners and associates is demonstrated at DB 26-28. For the principle that the same standard applies to both partners and associates, see also American Bar Association, Standing Committee on Professional Ethics, Informal Opinions Nos. 674 and 691 (July 23, 1963 and October 14, 1963, respectively).

** The footnote on PB 43 totally misses the point. The question is not whether the setting of fees by attorneys is subject to the anti-trust laws, but whether attorneys can invoke nebulous anti-trust considerations in order to avoid compliance with the Code of Professional Responsibility.

time, it maintains that his decision can be reversed only if it was an abuse of discretion (PB 27).

Plaintiff's brief attempts to overcome the ethical problem created by Mr. Schreiber's switching of sides by arguing that a countervailing policy exists against disqualification—the policy of making lawyers available to represent potential litigants (PB 28). Yet it is apparent that the countervailing policy has little weight in this case. As noted below (p. 18n), there are many competent attorneys who could represent plaintiff herein without violating or compromising Canon 4, or even appearing to do so; disqualification is not likely to prejudice the plaintiff, beyond the need to retain any one of these many other available attorneys. Even in a very specialized field, which this case does not involve, where the supply of counsel may be limited, the balancing of policies is nevertheless resolved in favor of disqualification. *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 574-575 (2d Cir. 1973) (textile patent attorney).

Plaintiff's brief is also notable for its heavy reliance on *United States* v. *Standard Oil Company*, 136 F. Supp. 345 (S.D.N.Y. 1955) (Kaufman, J.), a case dealing with a government attorney, rather than an attorney in private practice, and the governing principles are accordingly different (see DB 27-28). Thus, while *Standard Oil* recognized that the "chain of imputed knowledge has been held to extend, not only to the partners in a law firm, but to salaried law clerks in a firm" (136 F. Supp. at 360) (footnote omitted), it held that different rules applied to government attorneys and that in the case under review a complete separation of functions between the Washington and Paris offices of the government agency had been proved, thus barring the inference applicable to law firms (*id.* at 357, 360). Nevertheless, plaintiff cites this case as applying the government-attorney rule to law firms (PB 38).

Corrections of Some of Plaintiff's Misstatements of Fact

A. Mr. Schreiber's Exposure to Chrysler Confidences While at Kelley Drye

Plaintiff attempts to minimize Mr. Schreiber's extensive work for Chrysler, and the other Chrysler cases being handled by Kelley Drye during his association (PB 14-20, 23), claiming that none of those matters raised issues similar to those involved herein. The present suit cannot be dismissed, however, as plaintiff suggests, as a "simple case" over the amount of rent due, raising only "narrow issues" (PB 2, 42). On the contrary, the issues raised in the suit at bar include Chrysler's relationship with its dealers generally ("plaintiff and other dealers"; 7a); the fairness and equitableness of Chrysler's conduct, and coercion or lack of coercion of a dealer by, and a dealer's alleged subservience to, Chrysler (9a); Chrysler's fulfillment of oral and written agreements with dealers, especially agreements generally involving the dealers' premises and Chrysler's alleged obligations with respect thereto (7a-8a). Inconsistent with plaintiff's present assertion that the issues are "narrow" are its interrogatories, which clearly reflect that plaintiff claimed the issues concern all aspects of Chrysler's nationwide practices in leasing dealership facilities to dealers other than plaintiff, both with respect to Relocation Agreements and otherwise, and include questions as to any such agreements with each dealer, any communications as to all such agreements or leases, and any programs involving lease of dealership facilities "at any time" (See Document No. 3 in the Record on Appeal, pages 5-7).

As demonstrated at DB 8-12, several of the litigated cases worked on by Mr. Schreiber raised many issues encompassed by the suit at bar, including: (i) alleged coercion, and inequitable conduct by Chrysler (*DiCarlo, Bayside*)—which is relevant to plaintiff's Dealer's Day In Court Act claim of coercion of the dealer by, and sub-

servience of the dealer to, Chrysler; (ii) alleged breach by Chrysler of a contract with a dealer (*Rocco, DiCarlo, Bayside* and *Long Island*)—including an alleged oral agreement with respect to a dealer's relocation (*DiCarlo*), and Chrysler's alleged obligations with respect to dealership premises (*Rocco, Bayside* and *Long Island*); (iii) Chrysler's attempts to secure premises for dealer use, which is part of the relocation process (*Estree*); and (iv) Chrysler's alleged special treatment of certain dealers (*Bayside, Long Island*). It is submitted that this showing of the relevancy of evidentiary and legal issues raised by prior cases on which Mr. Schreiber worked, coupled with his total of well over 1,000 hours devoted to Chrysler matters (129a),* is more than ample to require disqualification.

Mr. Schreiber also did work for Chrysler on non-litigated matters, which have not been discussed because of their confidentiality (449a), and he gave advice directly to Chrysler personnel on some important nationwide programs under review (110a). Contrary to plaintiff's claim (PB 13n), Schreiber did not deny working on non-litigation

* Plaintiff disputes the contention that Schreiber spent well over 1,000 hours on Chrysler matters, pointing out that Chrysler failed to produce the time records or a detailed compilation thereof (PB 35-36). The compilation demanded by plaintiff (430a), however, was totally unreasonable, and Chrysler was not required to make it, nor was Chrysler required to produce the time records themselves (DB 31-32). *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) decided only that attorneys seeking a $1.5 million fee had to reveal the amount of time spent in different phases of the proceeding (discovery, oral argument, negotiation, etc.)—but not any part of the contents of the legal work such as would be reflected on Kelley Drye's time sheets. In addition, no ethical problem was involved in *Grinnell*, as the information regarding the attorney's work was to be produced for the benefit of a representative of the client itself, whereas here it is sought by the adversary. As to Chrysler's failure to request that Judge Weinstein review the time records *in camera*, plaintiff itself made no such request. Chrysler, however, did offer to discuss more fully Mr. Schreiber's representation of Chrysler if the Court deemed it necessary and proper (31a). The *in camera* procedure, of course, was rejected in the case cited by plaintiff, *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920, 926 (2d Cir. 1954), as imposing "a vast addition to the burden of the court and the parties."

matters; he expressly limited his discussion to "litigated matters" so as not to be "disclosing even arguably confidential information" (62a).

Other Chrysler cases being handled by Kelley Drye during Mr. Schreiber's association also raised many of the same issues as the cases noted above,* and involved as well Chrysler's activities in obtaining and maintaining premises for a dealer's use (*Urban, RGR*) (see DB 12-13). In addition, during Mr. Schreiber's brief absence from the firm, Kelley Drye became involved both with a dealer's relocation and an abortive attempt to relocate a predecessor of plaintiff (DB 13-14). While plaintiff seeks to evade these closely-related matters apparently on the theory that they did not technically arise during Schreiber's "tenure" (PB 12), confidential information regarding them may well have been received by him after his return to the firm in 1966 (126a-127a), and in any event plaintiff's assertion that no "partner or associate of Kelley Drye had the remotest contact with any form of Dealer Relocation Agreement" (PB 12) is amply contradicted.

In numerous instances, plaintiff's brief tries to distort the facts through various semantic ploys. One example is plaintiff's contention that Mr. Schreiber was a mere "young associate" (see, for example, PB 2, 7, and 41) with Kelley Drye, and is now a mere "junior member" (PB 5) of Hammond & Schreiber. But the canons of ethics make no distinction between young and older associates, or junior and senior partners. Furthermore, the fact is that by the time he left Kelley Drye, Mr. Schreiber had more than three years of legal experience, and was accordingly given substantial responsibility by the firm (104a). As to his alleged "junior" status in Hammond & Schreiber, it has been shown that the knowledge gained by Mr. Schreiber

* Contrary to the impression plaintiff seeks to create on PB 16, Kelley Drye did play a significant role, during Mr. Schreiber's tenure, in the *Buono* case (76a, 124a). That role later was more fully shown in a subsequent appeal, 449 F.2d 715 (3d Cir. 1971), which also showed the wide range of dealer-relationship issues involved.

while at Kelley Drye has been an important ingredient of the Hammond-Schreiber collaboration since 1969 (DB 15-16), and Mr. Schreiber's "litigation background" with Kelley Drye was apparently a major reason for their collaboration (75a; DB 18). Thus, plaintiff's contention that Mr. Hammond is "the expert" (PB 45) while Schreiber had nothing to contribute (PB 8) is baseless.

Plaintiff engages in such other semantic evasions as Mr. Schreiber's claim that another attorney, Mr. Gurney, "was the *principal* Kelley Drye associate working on dealer cases," that Schreiber did not work on dealer-related cases (other than *Rocco* and *Checker*) "in any *meaningful* sense," and that Schreiber did not have *"responsibility"* for such other cases (PB 18, 17 and 33, respectively; emphasis added). It is not significant, however, whether or not Mr. Schreiber was the principal Kelley Drye attorney working on those other cases (*DiCarlo, Bayside, Long Island* and *Estree,* discussed at DB 9-10), or if he was ultimately responsible for them. What is significant is whether or not Mr. Schreiber, through his participation in those cases, was exposed to Chrysler confidences, and that does not depend on how one characterizes his status or that of other attorneys. *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 216 F. 2d 920, 927 (2d Cir. 1954). Equally irrelevant is plaintiff's description of Schreiber's work for Kelley Drye clients other than Chrysler (PB 13-14), as it cannot negate the likelihood that he received confidential information about Chrysler during the more than 1,000 hours that he did work on its matters (129a).

Yet another semantic ploy utilized by Mr. Schreiber is reflected in his contentions that his "contacts with Mr. Rose, a sales official at [a Chrysler-owned dealership], *principally* involved the *Abikkaram* case" and that Schreiber's "access to files at Kelley Drye on the [*Ezzes*] case *principally* involved review of suitpapers in a previous case" (442a,

quoted at PB 24; emphasis added).* Once again, it is not what Mr. Schreiber claims to have been the principal subject matter under review that is significant, but whether or not Chrysler confidences relevant to the case at bar may have been obtained. Nothing in Schreiber's characterizations negates the likelihood that such confidences were, in fact, obtained. Contrary to plaintiff's contention (PB 20), Mr. Gurney simply cannot possibly know that Schreiber, allegedly, did not learn about cases pending in the litigation department during his tenure.

Chrysler does not rely upon an "osmotic process" (PB 21) or "gossip in the corridors" (PB 41) as being the source of Schreiber's receipt of Chrysler confidences. Chrysler does contend, however, that such confidences were actually obtained through Mr. Schreiber's own work on Chrysler's behalf, which involved extensive contacts with Chrysler personnel and review of Chrysler files, as well as a review of Kelley Drye files that might have appeared relevant to his work, and contacts with other Kelley Drye attorneys, primarily in the litigation department,** who might have had information relevant to Schreiber's work.

In addition, however, Mr. Schreiber would have acquired Chrysler confidences by discussing with other Kelley Drye

* While plaintiff makes much of Chrysler's failure to dispute Schreiber's claim of not having reviewed certain files (PB 17, 34), Chrysler simply does not know whether or not the claim is true. Indeed, legal presumptions have been adopted precisely because exact proof of an attorney's actual knowledge of confidential information available in the firm is always difficult, if not impossible, to obtain, especially several years after the association terminates. On the other hand, Chrysler has shown that Kelley Drye attorneys would frequently review files even on matters they were not handling, if those files could be helpful for another matter (109a-110a), and all of the firm's files were at Mr. Schreiber's disposal (458a).

** Contrary to plaintiff's suggestion (PB 6, 37), Chrysler does not seek to impute to Schreiber all the Chrysler confidences of all Kelley Drye partners. On the other hand, we submit that Chrysler confidences possessed by Mr. Schreiber's fellow attorneys in the firm's 12-man litigation department (454a) and his friends in other departments should be imputed to him, and, realistically, were likely to have been passed on to him.

attorneys or Chrysler personnel (DB 6) the cases in which the latter were involved. Discussions among Kelley Drye litigation attorneys took place both formally, in the office and at litigation department luncheons, and informally, during casual discussions attorneys had in and out of the office (453a-455a).* Mr. Schreiber acknowledges, for example, that he sees Mr. Gurney on a social basis (64a), and he has not denied having discussed Chrysler cases with Mr. Gurney (453a)—whom Schreiber has described as the primary Kelley Drye associate handling dealer cases during Schreiber's association (PB 18; 67a). Indeed, the affidavits of Schreiber, Gurney and Baum do not even purport to discuss all the conversations about Chrysler matters that these attorneys have had.

Mr. Schreiber contends that "both partners of [Kelley Drye], and clients as well, weigh the desirability of divulging information to associates," and that it "appeared to [Mr. Schreiber]" that "certain precautions [were taken] in this regard" (PB 24-25, quoting from 443a). Not only is the above contention, from an affidavit of Mr. Schreiber's, deceptively vague and conclusory; it is also false and not entitled to any credence. Mr. Schreiber would hardly be a good factual source as to the policies of Kelley Drye partners with respect to revealing confidences to associates. Mr. Ehrenbard, on the other hand, a Kelley Drye partner both now and during Schreiber's tenure (56a), is in a position to know the facts, and he states that there was a free exchange of information among Kelley Drye partners and associates, and that the firm's associates, in accordance with firm policy, sought out information relevant to their work from any appropriate sources—including personnel and files of both Kelley Drye and the client (105a-106a; 109a). In light of this unambiguous evidence from a person having knowledge of the facts, no weight whatsoever can be attached to Mr. Schreiber's uninformed speculation.

* Plaintiff's purported reliance upon the Gurney and Baum affidavits for the statement that "contacts among associates [of Kelley Drye] were restricted and occasional" (PB 22) is an evident distortion of the record.

Plaintiff argues (PB 12) that the pendency of other litigation against Chrysler similar to the case at bar proves that Hammond & Schreiber are not using confidential information in this action. The mere statement of this contention exposes its emptiness. Indeed, Chrysler has shown that Mr. Schreiber was directly exposed to relevant Chrysler confidences, and Judge Weinstein found that "[u]ndoubtedly, somewhere within the confines of Kelley Drye during the years Schreiber was employed, there existed a great deal of data, obtained confidentially, which could be of some value to some possible future antagonist of Chrysler—including plaintiff in this action" (499a).* The question presented on Chrysler's motion for disqualification, therefore, is whether in the case at bar plaintiff's counsel, whether consciously or not, are, or could be, utilizing any of such confidences; what other attorneys in other suits may do, and whether some of the confidences reposed in Mr. Schreiber could have been learned by such attorneys from other sources, are totally irrelevant. See EC 4-4; *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 572-573 (2d Cir. 1973); *Fleischer* v. *A.A.P., Inc.*, 163 F. Supp. 548, 551 (S.D.N.Y. 1958), *appeal dismissed sub nom. Fleischer* v. *Phillips*, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959); *Doe* v. *A. Corp.*, 330 F. Supp. 1352, 1355 (S.D.N.Y. 1971), *aff'd per curiam sub nom. Hall* v. *A. Corp.*, 453 F.2d 1375 (2d Cir. 1972). It is evident that as a result of his Kelley Drye experience Mr. Schreiber is likely to have information about Chrysler that would give him an unfair advantage in prosecuting the case at bar.

B. The Hammond-Schreiber Collaboration

With respect to the initial collaboration of Mr. Hammond with Mr. Schreiber in the *Pearlman* suit beginning in November 1969 (DB 15-16), plaintiff still tries to create

* Plaintiff's contention, at PB 38, 42, that Judge Weinstein's quoted statement was merely an assumption, is baseless. Any reading of his opinion clearly evidences that it was a finding—and one abundantly supported by the record and compelled by the breadth of Kelley Drye's special relationship with Chrysler (summarized at DB 5, 8-15).

the impression that their association did not begin until August 1970 (PB 9), and mischaracterizes Chrysler's objection as relating to Schreiber's use of "public information about Checker" obtained by Schreiber while working for Chrysler at Kelley Drye (PB 25). In fact, much of the information available to Mr. Schreiber in the *Pearlman* litigation was non-public information about both Chrysler and Checker acquired at Kelley Drye (112a-115a; 459a-460a). Contrary to Schreiber's claim, Kelley Drye did not cooperate with him in the *Pearlman* suit, beyond extending the normal professional courtesy of exchanging copies of public documents (461a).* Finally, the *Long Island* suit brought by Mr. Hammond against Chrysler was not settled even in principle until a few weeks before its discontinuance on November 28, 1969 (459a, 152a), and Hammond and Schreiber began their collaboration on *Pearlman* no later than the same month. Interestingly, plaintiff's erroneous claim that the settlement in principle occurred earlier (PB 26) derives from an affidavit of Mr. Schreiber, not Mr. Hammond, who was an attorney of record in the settlement (437a).

ARGUMENT

POINT I

The District Court did not act within any permissible discretion in denying Chrysler's motion for disqualification; rather, the Court made serious errors in applying the law, which errors require a reversal.

Plaintiff argues (PB 27-28) that a district court has great discretion in deciding motions for disqualification, and that the court below did not abuse its discretion in denying Chrysler's motion. Plaintiff thus stands on the proposition that Chrysler on this appeal—just as on a peti-

* Contrary to plaintiff's assertion, Kelley Drye did respond to the letter referred to in the footnote at PB 26, by its objections to the subpoena served by Hammond & Schreiber (204a). Plaintiff has failed, however, to mention that the Hammond & Schreiber letter was itself in response to Kelley Drye's letter setting forth the disqualification of Hammond & Schreiber (462a-463a).

tion for mandamus—must show an abuse of discretion in order to succeed (PB 1-2, 27).

While Chrysler believes that Judge Weinstein had no discretion to render a decision contrary to established precedent, and that he abused whatever discretion he may have had, no such showing is required on the present appeal. This Court so decided in effect when it dismissed Chrysler's petition for mandamus and held that Judge Weinstein's order should be reviewed instead on an appeal as of right (slip op. 3011); had the sole issue been one committed to the District Court's discretion, however, mandamus would have been the appropriate vehicle for review. Indeed, this Court indicated in its opinion that it would thoroughly review orders granting or denying motions for disqualification, and nothing in the opinion suggests that such review would be a very limited one, as plaintiff claims.

The cases cited by plaintiff (PB 27) do not support its claim, nor are they truly representative of the standard which Courts of Appeals have employed in reviewing motions for disqualification, especially where, as here, the district judge applied erroneous legal standards. Thus, in *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970), the defendant, prior to trial, moved to disqualify the plaintiff's attorney for violating Canon 5 by acting as trial counsel although he was likely to be called as a witness later on. The district judge denied the motion to disqualify. In fact, the challenged attorney did not testify, but the court's pre-trial ruling was nonetheless contested on appeal. This Court found that the district court's refusal to disqualify was based upon a sound application of Canon 5, and subsequent events had proven it factually correct; even if it were erroneous, no prejudice flowed therefrom, since the attorney did not testify. There was little for this Court to say on the academic question presented other than that the district judge, in retrospect, had made the proper decision. In the present case, on the other hand, Chrysler's claim that a breach of ethics is occurring has not been rendered moot by subsequent events.

Neither is *Waters* v. *Western Co.*, 436 F.2d 1072 (10th Cir. 1971) authority for holding that the resolution of disqualification motions is committed to the district court's discretion. In that case, the district court, in denying a motion for disqualification, evidently had not made any findings of fact or conclusions of law for the Tenth Circuit to review. Indeed, the former client opposed appellate review of the denial of disqualification. The Court of Appeals accordingly noted "[w]e literally have nothing before us capable of proper review" (436 F.2d at 1073), and proceeded to dismiss the appeal.

Any dictum in *Waters* to the effect that a district court has discretion in cases where only an appearance of impropriety is involved clearly does not reflect the law of this Circuit. Thus, in *General Motors Corp.* v. *City of New York*, —— F.2d ——, slip op. 4525 (2d Cir. June 28, 1974), this Court, in reversing the district court's decision and directing disqualification solely on the basis that the attorney's participation would create an appearance of impropriety, did not even remotely suggest that the lower court had any discretion in deciding the disqualification question, much less that an abuse thereof was either necessary, or the reason, for reversal. Similarly, in *Meyerhofer* v. *Empire Fire & Marine Ins. Co.*, —— F.2d ——, slip op. 4095 (2d Cir. June 10, 1974), this Court affirmed in part and reversed in part an order of disqualification cited in Chrysler's main brief.* Again, there was not the slightest suggestion in this Court's opinion that any question of discretion was involved.

Likewise, *Greene* v. *Singer Co.*, 461 F.2d 242 (3d Cir.), *cert. denied*, 409 U.S. 848 (1972), clearly does not stand for plaintiff's proposition that this Court can reverse the order

* The reversal in part is not relevant hereto since it was based on an attorney's right to reveal confidences in defending himself "against 'an accusation of wrongful conduct,'" Disciplinary Rule 4-101(C) (slip op. at 4103), an issue not raised by the case at bar. The affirmance in part of Judge MacMahon's order barred the challenged attorney from representing interests adverse to his former client in the pending suit.

below "only if it involved an abuse of discretion" (PB 27), or that the disqualification of counsel for breach of Canons 4 and 9 is a question committed to the district court's discretion. That case merely states that once a breach of ethics warranting some remedial relief has been established, the district court's choice of relief is normally respected on appeal.

As *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 564-565 (2d Cir. 1973) recognizes, the question of disqualification is of major importance, since the potential injury to public confidence in the bar as well as to the former client is great. An erroneous ruling simply cannot be shielded from thorough appellate review behind the nebulous claim of district court discretion.

Moreover, even if the District Court had any discretion, no deference could be afforded its exercise herein in view of Judge Weinstein's numerous misapplications of the law, which require reversal in this case. Thus, as discussed in Chrysler's main brief, Judge Weinstein erroneously ruled, *inter alia*, that (i) former associates of large law firms could be relieved of ethical obligations because of vague anti-trust considerations, despite this Court's contrary holding in *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 575 (2d Cir. 1973) (DB 23-25); (ii) the imputation of knowledge to attorneys in a law firm varies with the status, power and compensation of each attorney within the firm, despite established precedent that knowledge is imputed equally to partners and associates (DB 26-28; *supra*, p. 2n);* (iii) a self-defeating burden of proof is imposed on the former client moving for disqualification, despite a contrary ruling in *Emle, supra*, and other cases (DB 29-33); and (iv) an appearance of impropriety is not a basis for disqualification, despite overwhelming authority to the contrary (DB 39-42); *infra*, pp. 20-24). In view of these and other errors in the order below, that order must

* As noted above, plaintiff's brief has virtually abandoned the District Court's conclusions with respect to items (i) and (ii) and other matters, thus conceding in effect that those rulings cannot be supported.

be reversed regardless of what standard of review is applied.

Judge Weinstein erred also in concluding that the presumption of disqualification in Mr. Schreiber's case was rebuttable (501a), and plaintiff similarly argues (PB 38-41) that Mr. Schreiber can be subject only to a vicarious disqualification (because of his former association with Kelley Drye) and that he is entitled to rebut the presumption of knowledge of the client's confidence, as was Malkan in *Laskey Bros. of W. Va., Inc.* v. *Warner Bros. Pictures, Inc.*, 224 F.2d 824 (2d Cir.), *cert. denied*, 350 U.S. 932 (1955). This is an erroneous view, however, because Mr. Schreiber, unlike Malkan, was directly exposed to a great deal of relevant confidential information and therefore must be *irrebuttably* presumed to have knowledge of Chrysler confidences that could be of use in this case.

Judge Weinstein's and plaintiff's comparison of Schreiber's position to that of Malkan is based upon a serious misunderstanding of the facts and holding of *Laskey*. Those facts are amply described, without contradiction, in the majority and dissenting opinions in that case and in this Court's opinion in *Fisher Studios, Inc.* v. *Loew's Inc.*, 232 F.2d 199 (2d Cir.), *cert. denied*, 352 U.S. 836 (1952). Briefly, one Isacson had been employed for a few years as an associate with a large law firm, Sargoy & Stein, which represented a number of motion picture companies. Isacson, like Schreiber, took part in a number of suits on behalf of the firm's clients, had contact with the clients' employees as well as with other attorneys in the firm representing those clients, and also, like Schreiber, "had complete access to the firm's files which contained an abundance of data and information, not only gathered by [the] law firm but also disclosed to and confided in it by the motion picture companies concerning the manner in which the companies did business. . . ." (*Laskey*, 224 F.2d at 829 (dissenting opinion)).

Isacson left Sargoy & Stein and subsequently joined with Malkan to form Malkan & Isacson, which firm then

commenced several suits against the same motion picture companies. Because Isacson had had "access to significant quantities of confidential information [at Sargoy & Stein] of great value" in the prosecution of these cases (*Fisher*, 232 F.2d at 202), there was a clear breach of ethics in his prosecution of these suits, and accordingly both he and Malkan & Isacson had to be disqualified.

Malkan & Isacson was subsequently dissolved and Malkan then formed a new firm with one Ellner. The particular issue in *Laskey* was whether Malkan's former association with Isacson prevented him and his new firm, Malkan & Ellner, from prosecuting similar suits against the same defendants. One of the suits commenced by Malkan & Ellner had come to it through Malkan & Isacson, which, of course, had been disqualified, and this Court ruled that Malkan and Malkan & Ellner could not prosecute this suit since Malkan's disqualification survived the dissolution of his partnership with Isacson. The other suit, however, was one that came to Malkan after his partnership with Isacson had terminated and had not come through Isacson; thus, the question of vacarious disqualification arose. Clearly, unlike Mr. Schreiber here, and unlike Isacson, Malkan had never been directly exposed to the former client's confidences. Thus, as to the latter suit, Malkan was allowed the opportunity to rebut "the inference that he received confidential information from Isacson" (*Laskey*, 224 F.2d at 827).

To suggest that Schreiber's position here is similar to Malkan's is thus obviously incorrect. Schreiber stands in Isacson's shoes since he did a significant amount of work for Chrysler and received confidential information within the law firm as well as through Chrysler's files and employees. Hammond & Schreiber's position is similar to that of the firm of Malkan & Isacson, and the firm is therefore disqualified as well.*

* In its brief (PB 40n) plaintiff erroneously suggests that *American Can Co.* v. *Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971), *Fleischer* v. *A.A.P., Inc.*, *supra*, and *United States* v. *Standard Oil Co.*, *supra*, all support plaintiff's perverse distortion of *Laskey*, and

However, even assuming, *arguendo*, that Schreiber should be given the same opportunity as Malkan to rebut the presumption, it is submitted that his purported rebuttal in the District Court failed to measure up to the required standard of proof--which is that "the attorney must prove a negative" (*Laskey*, 224 F.2d at 827). That was the standard which this Court applied to Malkan, and plaintiff's suggestion that a lesser standard should be applied to Mr. Schreiber (PB 42n) is baseless. Malkan's rebuttal was successful because he testified "that he had received *no* [confidential] information" (*Laskey*, 224 F.2d at 827) (emphasis added), thus negating any possibility that his participation in the lawsuit could involve a breach of ethics. Schreiber, on the other hand, does not deny receipt of Chrysler confidences; rather, he merely states his personal opinion that none of the Chrysler confidences he received are relevant to the case at bar (PB 41-42n). Thus, the only assurance Schreiber is able to offer is his own subjective characterization of what Chrysler confidences may, and what arguably may not, be relevant to this case. Such a self-serving characterization, which even at best leaves room for a wide margin of error, will certainly not serve to discharge Mr. Schreiber's heavy burden of demonstrating, to the bar, to his former client, and to the public, that no abuse of confidence could be involved in his prosecution of this suit.

Plaintiff attempts to sidestep the compelling analogy between Isacson's and Schreiber's positions by injecting a

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recognize that "the problem of the *former* member of the firm [is treated] differently." (emphasis in original). Nothing could be further from the truth. These cases recognize that the "former member" who is treated "differently", is one who, like Malkan, had no direct access to client confidences and is only vicariously disqualified because of his association with someone like Isacson, or Schreiber, who had such direct exposure. The "firm" whose other former members are only rebuttably presumed to be disqualified after its dissolution would, of course, be one like Malkan & Isacson or Hammond & Schreiber, some members of which had no direct access to client confidences, but not one in the position of Sargoy & Stein or Kelley Drye, the very firms in whose partners and associates client confidences had been directly reposed.

baseless claim that Chrysler's true motive is to obtain the disqualification of Mr. Hammond, a charge which the District Court did not accept (PB 6). The truth is that Chrysler's motive is the protection of its own confidences (130a), and plaintiff has not shown any facts to the contrary. Necessarily, Mr. Hammond's disqualification must also be sought (*Laskey, supra*), but the reason is of Hammond's own making. As a dealer's advocate against Chrysler and a former "counsel to various dealer groups" (PB 9) which included leaders and participants of the "Dodge Dealer Rebellion" (98a)*, Mr. Hammond should have scrupulously avoided collaborating with a former Chrysler attorney; nonetheless, he selected from all the available attorneys in New York precisely a person whose "litigation background" (75a) encompassed broad exposure to Chrysler confidences and to dealer litigation on Chrysler's behalf.

While plaintiff asserts that clients of large law firms can appreciate that associates "cannot forever be wedded to their initial employer" (PB 43-44), Chrysler could expect, rightfully, that Mr. Schreiber would protect the confidential information he received, rather than exploit it by allying himself with a self-professed specialist** in dealer litigation. And, while plaintiff claims that disqualification would inflict a hardship upon Mr. Schreiber's nascent practice, such a consideration is truly irrelevant when a breach

* Mr. Hammond's contention (447a, PB 27) that only one suit was brought as part of the "Dodge Dealer Rebellion" (DB 17-18) is dubious at best, but purports to reflect Hammond's own familiarity and affiliation with the "Rebellion."

** It should be noted, incidentally, that while Mr. Hammond is a specialist in dealer advocacy (PB 9), he is hardly the only attorney available to represent the plaintiff and other dealers. Indeed, plaintiff in another litigation with Kelley Drye is represented by a different attorney (465a). While Mr. Hammond has freely speculated as to plaintiff's reasons for retaining Hammond & Schreiber in this action (PB 10; 88a), no affidavit by plaintiff as to its own motivation has been submitted. All the dealer suits discussed at DB 8-14, except the *Long Island Motors* suit, were brought by attorneys other than Mr. Hammond (130a). And, Hammond does not deny Chrysler's contention that he has never obtained a judgment on behalf of any dealer, whereas other attorneys have (131a, 464a).

of Canon 4 is involved. As this Court noted in *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920, 926 (2d Cir. 1954):

> "[I]t will not do to overemphasize the hardship [caused by disqualification] which, after all, is an inevitable incident to [the attorney's] own choice of profession and choice of employment. But that aside, the specialized field is but a fragment of the overall field still open to him in which much of his general accumulated experience can find useful outlet."
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> "[W]e think that fundamentally the Canons must be viewed not as a Bill of Rights for the Bar but, rather, a codification of the more important limitations on legal practice broadly deemed necessary for the protection of clients."

The client and the public cannot be expected to accept the notion that ill-defined antitrust speculations absolve young attorneys who did extensive work in the client's representation from the requirement of preserving matters of confidence. They will inevitably be hesitant to make full disclosure to their attorneys, thus making it difficult if not impossible for them to secure proper legal representation, lest some young associates commit a breach of confidence and escape disqualification "on a technicality." *E.F. Hutton & Co.* v. *Brown*, 305 F. Supp. 371, 395 (S.D. Tex. 1969); see EC 4-1. As this Court recently stated: "The subtleties of differential proof will not obviate the 'appearance of impropriety' to an unsophisticated public." *General Motors Corp.* v. *City of New York*, —— F.2d ——, slip op. 4525, 4547 (2d Cir. June 28, 1974). It is for this reason that on a motion for disqualification an attorney's "conduct should not be weighed with hairsplitting nicety." *United States* v. *Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964). Thus, the Ninth Circuit has said in *Chugach Elec. Ass'n* v. *United States District Court*, 370 F.2d 441, 444 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967):

> "It must be remembered that the attorney in such situations as this does not have the shelter enjoyed by a defendant whose adversary must meet a burden of proof. Where conflict of interest or abuse of professional confidence is asserted, the right of an attorney freely to practice his profession must, in the public interest, give way in cases of doubt."

To hold attorneys, young or old, to any lesser standard than the "strict prophylactic rule" of *Emle* would force law firms to withhold from associates confidential information necessary for effective representation of the firms' clients. Further, unless Judge Weinstein's decision is reversed, the public will be encouraged to seek out former attorneys of prospective adversaries to bring suit against the former clients, thus compounding the very problem Canon 4 seeks to prevent, by placing many attorneys in conflict situations.

POINT II

The prosecution of a dealer's case by Mr. Schreiber, after his broad exposure to Chrysler confidences while representing Chrysler at Kelley Drye, inevitably creates a glaring appearance of impropriety which requires disqualification.

Simply put, the position of both Judge Weinstein (502a) and of plaintiff (PB 46-47) is that there can be no appearance of impropriety warranting disqualification under Canon 9 unless Mr. Schreiber is shown to have gained valuable information, thus creating an actual breach of Canon 4 by his participation in this lawsuit. Thus, it is asserted that unless there is a close relationship, if not an identity of issues, between Schreiber's activities on behalf of Chrysler and his present representation of an adverse interest (Chrysler has abundantly demonstrated that such a relationship does exist), there can be no appearance of evil. Proof of this relationship would, of course,

establish a violation of Canon 4, which would in itself require disqualification. However, Canon 9, which provides that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety", cannot be narrowly interpreted.

While there may be some overlap between Canon 9 and other Canons in specific cases, the adoption of plaintiff's argument, that a violation of Canon 9 cannot exist apart from a violation of Canon 4, would render Canon 9 mere surplusage, a hollow principle without any independent vitality. The truth is, however, that wholly apart from any violation of Canon 4, the appearance of impropriety is, of itself, sufficient reason to disqualify counsel. Thus, courts have directed the disqualification of an attorney where there was no showing of any relationship or similarity between the attorney's former representation and his later, adverse retainer, but only the possibility that something the attorney had learned in confidence might prove useful in the later suit.

For example, in *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382 (3d Cir. 1972), *aff'g* 333 F. Supp. 1049 (E.D. Pa. 1971), *cert. denied*, 411 U.S. 986 (1973), the attorney whose disqualification was sought had, some years before, while associated with a law firm, done a significant amount of work* for one of the subsequently-merged corporations. He had had access to the company's officials and had interviewed them in regard to matters not connected with the transactions being attacked in his present suit (333 F. Supp. at 1050-51). It was thus clear that he had received confidential information, but "the exact nature of the information he received [was] unknown" (469 F.2d at 1385). There was not even a similarity between his previous work for the corporation and the suit he was

* The disqualified attorney had spent about 669 hours in the representation of the company (469 F.2d at 1384 n. 8). Mr. Schreiber, of course, spent well over 1,000 hours of his time in representing Chrysler. Contrary to plaintiff's speculation (PB 36n), the challenged attorneys in *Fleischer* v. *A.A.P., Inc., supra*, had represented the former clients only on an occasional basis, and the former clients had their own personal attorney. 163 F. Supp. at 554-56.

presently bringing; all that existed was the *possibility* that he *might* have learned something which might prove relevant in the present litigation (469 F.2d at 1385). The Third Circuit held this to be sufficient, however, to require his disqualification because of the appearance of an impropriety created by his side-switching:

> "We do not believe that [the attorney] should be permitted to place himself in a position where, even unconsciously, he will be tempted, *or it appears to the public and his former clients that he might be tempted,* in the interests of his new client, to take advantage of information derived from confidences placed in him by [the former client] and its officials." (469 F.2d at 1385) (emphasis added).

Similarly, in *Chugach Elec. Ass'n* v. *United States District Court,* 370 F.2d 441, 443 (9th Cir. 1966), *cert. denied,* 389 U.S. 820 (1967), the challenged attorney, who was not a director of the defendant corporation as plaintiff erroneously asserts (PB 46), had been at one time counsel to the corporation which sought to disqualify him. He resigned when a minority of the board of directors gained control of the corporation. It was the activities of the new board which he challenged, activities which occurred only after he left the corporation's employ. Still, the Ninth Circuit ordered his disqualification, because the attorney had been "in a position to acquire knowledge casting light on the purpose of later acts and agreements" which were the subject of the lawsuit. Thus, the mere possibility that the attorney had acquired information which somehow might prove pertinent in the lawsuit necessitated his disqualification.

Likewise, in *Motor Mart, Inc.* v. *Saab Motors, Inc.,* 359 F. Supp. 156 (S.D.N.Y. 1973), Judge Pollack directed disqualification in a dealer suit, in a situation very similar to the present one. Judge Pollack did not specify or find any connection between the attorney's prior work on Saabs' behalf, which consisted of representing Saab Motors in a

dealer litigation some years before as well as other general legal work on its behalf, and the dealer's suit he was now prosecuting. Still, Judge Pollack directed disqualification because of the appearance of impropriety created by the possibility that an abuse of confidence might develop, writing:

> "The prior representation made possible his exposure to business methods and confidential information, giving rise in the present action to an appearance of conflict of interest. *Even if his relationship with Saab Motors was relatively small and even if the prior action did not raise issues identical to those involved herein, his past activities raise a shadow over his present involvement. Emle Industries, supra,* requires this Court to remove that shadow by disqualifying counsel. . . ." (359 F. Supp. at 158) (emphasis added).

An appearance of impropriety requiring disqualification can accordingly exist even in the absence of actual or presumed receipt of confidential information. *E.F. Hutton & Company* v. *Brown*, 305 F. Supp. 371, 395 (S.D. Tex. 1969). Disqualification is mandated whenever it appears to the public or to the former client that the attorney might have learned information during his prior representation which could possibly give him an advantage during his present suit. As the Standing Committee on Professional Ethics of the American Bar Association has observed:

> "It is also true that it is not what the lawyer may have learned in the previous lawyer-client relationship but what others, the bar and the public, may have thought was learned that prevents assuming a new lawyer-client relationship with a former opponent." Informal Decision No. C-493 (Nov. 22, 1961).

See also, *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973), discussed at DB 39-40.

Accordingly, wholly apart from the actual breach of confidence present here, Hammond & Schreiber must be disqualified because of the blatant appearance of impro-

priety created by Mr. Schreiber's participation in this lawsuit. As in *Richardson, Chugach* and *Motor Mart,* Mr. Schreiber had access to and was exposed to confidential information which, at the very least, "might be related to the subject matter of his subsequent representation" (*Richardson,* 469 F.2d at 1385) or might "provide him with greater insight and understanding", thus affording him an unfair and improper advantage in this litigation (*Chugach,* 370 F.2d at 443). Neither the public nor the client can be expected to understand how the courts could permit an attorney, who formerly worked for Chrysler in the firm which since Chrysler's organization has been its counsel in all aspects of its affairs, to ally himself with a self-acknowledged specialist in dealer litigation and to prosecute a dealer's suit against the client whose confidences he was and still is bound to protect. The vistas of the legal profession are not so limited, nor is the supply of competent counsel so short, that a young attorney should be allowed to begin his practice by capitalizing on the clients he once represented.

Conclusion

It is accordingly respectfully submitted that the order below should be reversed, and that the other relief requested at pages 42-43 of Chrysler's main brief should be granted in all respects.

Dated: July 23, 1974

Respectfully submitted,

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